Date: 20070228

Docket: IMM-6447-05

Citation: 2007 FC 229

Ottawa, Ontario, February 28th, 2007

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

PANCHALINGAM NAGALINGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

and THE MINISTER OF PUBLIC SAFETY

AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the Opinion of the Minister pursuant to paragraph 115(2)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), that the applicant, a Convention refugee, should not be allowed to remain in Canada because:

1. he is inadmissible on grounds of organized criminality;

2. the nature and severity of acts committed justify refoulement under the Act; and

3. the applicant's removal would not subject him to a substantial risk of torture, cruel or unusual punishment or persecution.

[2] This application raises for the first time serious questions of general importance with respect to the refoulement or removal from Canada of refugees who have been found to be persons inadmissible on grounds of organized criminality.

BACKGROUND

[3] The applicant is a 32 year-old citizen of Sri Lanka. He came to Canada in August 1994 and applied for refugee status, which was granted in March 1995. He became a permanent resident of Canada in March 1997.

[4] On August 24, 2001, the applicant became the subject of a report under the former *Immigration Act*, R.S.C. 1985, c. I-2 (the former Act), which alleged that he was inadmissible to Canada on grounds of organized criminality, namely being a member of the A.K. Kannan Tamil gang.

[5] On October 18, 2001, the applicant was arrested and detained based on the danger he represented to the public if released. On June 8, 2003, the Immigration Division of the Immigration and Refugee Board (the Board) ordered that the applicant be released on terms and conditions. However, that decision was quashed by Mr. Justice John O'Keefe on December 17, 2004 in *Canada (Minister of Citizenship and Immigration) v. Nagalingam*, 2004 FC 1757.

[6] On May 28, 2003, the Board found the applicant to be inadmissible to Canada for organized criminality under paragraph 37(1)(a) of the Act. The Board ordered that the applicant be deported. On October 12, 2004, Madam Justice Elizabeth Heneghan dismissed the applicant's application for judicial review of the Board's decision concerning his inadmissibility: *Nagalingam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1397.

[7] On July 5, 2003, the respondent served notice on the applicant that a determination would be made under paragraph 115(2)(b) of the Act as to whether he should not be allowed to remain in Canada based on the nature and severity of the acts committed. The applicant provided submissions and evidence under cover letters dated August 8, 2003 and November 11, 2003.

[8] On July 20, 2004, the respondent sent the applicant a document titled "Request for Minister's Opinion" dated July 13, 2004. The applicant was invited to provide further submissions on the material disclosed. The applicant provided further submissions and evidence on August 3, 2004.

THE DECISION UNDER REVIEW

[9] On October 4, 2005, the respondent issued the Opinion of the Minister pursuant to paragraph 115(2)(b). The Minister first considered "the nature and severity of the acts committed", and then assessed the applicant's risk of torture or to cruel or unusual treatment or punishment or persecution, as the Federal Court of Appeal recognized in *Ragupathy v. Canada (Minister of Citizenship and*

Immigration), 2006 FCA 151 at paragraphs 16-19, is required under section 7 of the Charter.

[10] In his opinion, the Minister found that the applicant was a member of the A.K. Kannan gang and involved in its criminal activities. He found that the gang had been involved in significant and serious criminal activity against civilians and a rival VVT gang. These activities included murder, attempted murder, human trafficking, extortion, drug trafficking, credit card fraud, welfare fraud, weapons trafficking, robbery, kidnapping, and the intimidation of witnesses in criminal proceedings.

[11] The Opinion of the Minister pursuant to paragraph 115(2)(b) of the Act detailed criminal convictions, criminal charges and "occurrence reports" with respect to the applicant. The information included:

> 1. three criminal convictions, two of which resulted in imprisonment for short periods of time;
>
> 2. criminal charges for being in possession of a meat cleaver and concealment of the weapon (the meat cleaver), intimidation of witnesses from testifying in criminal proceedings, and assault; and
>
> 3. being shot at five times following his departure from a correctional institution and the applicant's vehicle being fired upon while his spouse and child were in the car.

[12] The Minister referred specifically to the acts committed by A.K. Kannan gang. The Minister stated as a fact that the A.K. Kannan gang has been involved in significant and serious criminal activity including violence. The opinion quotes from a Toronto Police report which states that the A.K. Kannan gang, and a rival gang, "are involved in criminal acts including murders, attempted murders, serious assaults, extortions, kidnappings, frauds, drugs and weapons offences". At paragraph 16, the Minister's Opinion stated:

> In terms of the nature and severity of the acts committed, the evidence shows the existence of facts supporting Mr. Nagalingam's membership in and involvement in the criminal activities of the A.K. Kannan, the fact that Tamil gangs, including the A.K. Kannan, pose a unique and pressing threat to Canadian society, and the fact that the A.K. Kannan has been involved in significant and serious criminal activity against civilians and a rival gang (i.e. the VVT), including violence.

[13] The Minister concluded that the nature and severity of the acts committed by the applicant's gang were "serious and significant", and that the applicant's risk of harm upon return to Sri Lanka was a mere possibility. The Minister further considered the applicant's humanitarian and compassionate considerations, including the presence of his common-law spouse, Canadian born child and other family members

in Canada. The Minister concluded that, given that the applicant did not face a substantial risk of torture, a risk to life or a risk of cruel and unusual treatment or punishment, and that the applicant's humanitarian and compassionate considerations did not warrant favourable consideration, the nature and severity of the acts committed were determinative and, as such, the applicant should not be allowed to remain in Canada.

PROCEDURAL HISTORY

[14] On October 25, 2005, the applicant filed this application for leave and judicial review contesting the Minister's opinion. On November 16, 2005, the applicant applied for a stay of the execution of his removal order, which was scheduled to be executed on December 5, 2005.

[15] On December 2, 2005, Madam Justice Eleanor Dawson issued a decision dismissing the stay motion. Dawson J. found that there was a serious issue concerning whether the Minister properly considered the phrase "the nature and severity of acts committed" in paragraph 115(2)(b). However, Dawson J. found that the evidence did not establish that the applicant would face irreparable harm if removed to Sri Lanka.

[16] The applicant brought a second motion for a stay on December 4, 2005 before the Ontario Superior Court of Justice. On December 5, 2005, Mr. Justice Wilson issued a decision concluding that the Court should neither assume jurisdiction nor grant the injunctive relief sought by the applicant. The respondents' cross motion for a permanent stay of the proceedings was granted. The applicant was removed from Canada the same day.

ISSUES

[17] This application raises the following issues:

1. Did the Minister err in concluding that the applicant's removal to Sri Lanka would not expose him to a substantial risk of torture or a risk to life or to cruel and unusual treatment or punishment?

2. If, in the preparation of an opinion under paragraph 115(2)(b), the Minister finds that a refugee who is inadmissible on grounds of organized criminality does not face a risk of persecution, torture, cruel and unusual punishment or treatment upon return to his country of origin, does such a finding render unnecessary the Minister's consideration of the "nature and severity of acts committed" under paragraph 115(2)(b)?

3. Did the Minister err in interpreting paragraph 115(2)(b) by considering the "nature and severity of the acts committed" by the criminal organization as opposed to the applicant personally?

4. Did the Minister err in failing to consider the applicant's risk of persecution?

5. Does paragraph 115(2)(b) target non-citizens in a manner that is contrary to section 7 of the *Canadian Charter of Rights and Freedoms*?

STANDARD OF REVIEW

[18] With respect to factual findings, the Minister is entitled to considerable deference in light of his relative expertise in assessing risk of harm and the severity of acts committed. As the Supreme Court of Canada held in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraph 41, the Court should not reweigh the factors considered by the Minister provided that the decision is not patently unreasonable. The Court's determination of the standard of review in *Suresh* was based on the danger opinion provisions under paragraph 53(1)(b) of the former Act. The same level of deference should apply to a Minister's opinion issued under section 115 of the current Act: *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 172; *Dadar v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1381; *Fabian v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1527.

[19] With respect to questions of law, the Minister enjoys no expertise relative to the reviewing Court, and a standard of correctness applies.

RELEVANT LEGISLATION

[20] The legislation relevant to this application is as follows:

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11;

2. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27; and

3. *Immigration Act*, R.S.C. 1985, c. I-2.

[21] The key provision of this legislation are sections 37 and 115 of the Act, which provide as follows:

Organized criminality	Activités de criminalité organisée
37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	**37.** (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :
(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in	a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du

furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

Application

(2) The following provisions govern subsection (1):

(a) subsection (1) does not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest; and

(b) paragraph (1)(a) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

[…]

Application

(2) Les dispositions suivantes régissent l'application du paragraphe (1) :

a) les faits visés n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national;

b) les faits visés à l'alinéa (1)a) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.

[…]

Protection

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or

Principe

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel

punishment.	elle peut être renvoyée.
Exceptions	Exclusion
(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

ANALYSIS

Preliminary issue: Affidavit of Professor Rudramoorthy Cheran

[22] At the outset of the hearing, the parties made submissions with respect to an affidavit sworn by Professor Rudramoorthy Cheran. As I indicated at the hearing, this affidavit is not relevant to the arguments under section 7 of the Charter or with respect to the removal of the applicant under paragraph 115(2)(b) of the Act. It became clear during the course of the hearing that there was nothing in this affidavit upon which the applicant sought to rely. Accordingly, the admissibility of this affidavit became a non-issue.

Issue No. 1: Did the Minister err in concluding that the applicant's removal to Sri Lanka would not expose him to a substantial risk of torture or a risk to life or to cruel and unusual treatment or punishment?

[23] The applicant argues that the Minister ignored or misinterpreted the evidence relating to the risk faced by the applicant in Sri Lanka. In particular, the applicant argues that the Minister:

a. failed to give any weight to the finding of the Convention Refugee Determination Division (CRDD) that the applicant is a Convention refugee;

b. misinterpreted and selectively read the 2003 and 2004 US Department of State Country Reports for Sri Lanka;

c. relied on irrelevant evidence;

d. ignored or misinterpreted the applicant's personal circumstances and personal risk upon return to Sri Lanka; and

e. ignored relevant portions of the evidence submitted by the applicant on November 11, 2003 and August 3, 2004.

a. Did the Minister fail to give weight to the CRDD's finding that the applicant is a Convention refugee?

[24] With respect to the applicant's first objection, the Minister specifically considered the applicant's status as a refugee at paragraph 39 of his Opinion:

> I note that Mr. Nagalingam left Sri Lanka in 1994, some ten years ago when he was 21 years of age. I certainly acknowledge that Mr. Nagalingam was found to be a Convention refugee by the CRDD, however, this decision was rendered in 1995, some ten years ago. In my view, conditions in Sri Lanka are vastly different than when Mr. Nagalingam left that country for Canada in 1994, and when he was found to be a Convention refugee in 1995. In my view, the conditions in Sri Lanka today demonstrate a change of circumstances as outlined on page 3 of Mr. Nagalingam's lawyer's letter dated August 3, 2004 in that they are "significant".
>
> [Emphasis added]

[25] It cannot be said that the Minister failed to give any weight to the CRDD's determination. The Minister acknowledged the applicant's refugee status. However, as the Minister's Opinion states, having Convention refugee status does not conclusively determine the issue of whether there is a substantial risk of torture or persecution several years after the refugee status is granted. The Minister reviewed the available evidence to determine whether the current country conditions in Sri Lanka gave rise to a present substantial risk of harm. He clearly explained the reasons why he chose not to rely on the CRDD's determination made ten years earlier. As the Court held in *Camara v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 168, the fact that the CRDD considered a person to be at risk in the past does not establish that he is still at risk several years in the future. Accordingly, there is no merit to the applicant's objection that the Minister failed to give weight to the CRDD's determination.

b. Did the Minister ignore relevant evidence?

[26] The applicant argues that the Minister ignored relevant evidence contained within the 2003 and 2004 US Department of State Country Reports for Sri Lanka. In particular, the applicant argues that the Minister ignored several findings including those that the "military and police reportedly tortured, killed and raped detainees", the

state conducted “arbitrary arrests”, and that the LTTE committed “serious human rights abuses”.

[27] At pages 12 to 17 of the Opinion, the Minister provides a summary of the relevant information contained within the U.S. Department of State Country Reports for 2003 and 2004. It is true that the Minister did not repeat in his Opinion all of the evidence available to him in these reports. However, I am not persuaded that the Minister ignored relevant evidence.

[28] The evidence before the Minister was voluminous and it would be unreasonable to require that he address or quote comprehensively from each portion of each piece of evidence that was before him. Nor do I find that the Minister was unduly selective in his consideration of the evidence. Within paragraph 40 of his opinion, the Minister identified the salient points that have been raised by the applicant: he referred on page 13 to the fact that “the military and police reportedly tortured, killed and raped detainees.” He acknowledged the reports of arbitrary arrest within the same summary. He also noted that “Violence against religious minorities increased, and institutionalized ethnic discrimination against Tamils remained a problem” and that “The LTTE continued to commit serious human rights abuses.” Contrary to the applicant’s submission, the Minister’s Opinion includes a thorough review of the evidence including the facts which the applicant argues were ignored by the Minister. The applicant’s challenge to the Minister’s factual findings on the basis that he ignored relevant evidence cannot succeed. Therefore the factual findings of the Minister are not patently unreasonable on the basis that he ignored relevant evidence.

c. Did the Minister rely on irrelevant evidence?

[29] The applicant argues that the Minister relied on irrelevant evidence, categorized by the applicant as follows: (i) evidence regarding the relative peacefulness of recent elections; (ii) public political statements in support of the peace process; and (iii) a European Court decision finding that in the “particular circumstances of [that] case” it had not been established that the individual, a Tamil male, would face substantial risk of torture in Sri Lanka, to support his conclusion that the applicant would not be at risk if returned.

[30] Evidence relating to recent elections and the peace process, while not determinative of current conditions in a country or the risk faced by a particular applicant if returned to that country, is relevant to the Minister’s factual inquiry. With respect to the Minister’s reference to the judgment of the European Court of Human Rights in *Thampibillai v. The Netherlands*, it would not be appropriate for the Minister to base his conclusion regarding the applicant’s risk of torture if returned to Sri Lanka on this decision. However, it is clear from the Minister’s reasons for decision that his reference to the European Court’s judgment was simply *obiter*. I do not agree that the Minister’s decision is patently unreasonable on account of the Minister’s consideration of any of the evidence identified by the applicant. The applicant’s challenge on this basis must fail.

d. Did the Minister ignore or misinterpret the applicant's personal circumstances and personal risk upon return to Sri Lanka?

[31] The applicant argues that the Minister ignored or misinterpreted the evidence regarding the applicant's personal circumstances and personal risk if returned to Sri Lanka. Specifically, the applicant argues that the Minister misconstrued evidence relating to the public allegations about the applicant, his connection to the A.K. Kannan gang, and A.K. Kannan's alleged connection to the LTTE. Instead, the applicant argues, the Minister relied selectively on evidence supporting the conclusion that Tamil returnees are generally not at risk in Sri Lanka.

[32] The applicant's objection on this ground relates to the Minister's treatment of evidence as described in paragraph 45 of his Opinion:

> Much concern has been expressed over the treatment that would be accorded to returning deportees. In particular, Mr. Nagalingam has indicated that as a result of his being associated with the A.K. Kannan gang which is associated with the LTTE, he expects to be targeted for adverse treatment should he be returned to Sri Lanka. In connection with this fear, I take cognizance of the material from the Research Directorate of the [Board] dated August 5, 2003 […] indicating that in fact this is not the case for persons returning in possession of the necessary documentation – which would be the situation for Mr. Nagalingam. I quote as follows: "To the best of our knowledge, allegations that returnees to Sri Lanka, i.e. deportees and failed asylum seekers, are tortured on return is a complete fabrication. There is a well established procedure for dealing with returnees, which we have discussed on several occasions with senior level[s] of the Ministry of Interior. Although standard procedure is for deportees to be routinely referred to the Airport Division of the Criminal Investigation Division (CID) for interview on return, in our experience there are no arbitrary detentions without due process, and certainly no torture. Returnees who do not have pending arrest warrants or active charges in Sri Lanka are simply released." Further "Some deportees are questioned for a short period and then allowed to leave the airport; others are not questioned at all" – this was information received from the United Nations High Commissioner for Refugees in Sri Lanka. That article also revealed that the Swiss government operated a "safe house" to assist returnees in become re-integrated into Sri Lanka – however, this house was closed due to a lack of use. A review of the material before me does not indicate that an arrest warrant for Mr. Nagalingam exists in Sri

> Lanka or that he would be of any overriding interest to Sri Lankan authorities. […]
>
> [Emphasis added]

[33] As the excerpt above indicates, the Minister considered information generally applicable to Tamil returnees but also applied this information to the particular circumstances of the applicant. Nothing in my review of the evidence indicates that the Minister's treatment of the evidence was unduly selective or capricious. Based on the evidence available to the Minister, I conclude that it was open to Minister to make the factual findings he did with respect to the applicant's personal circumstances and risk upon return to Sri Lanka.

[34] The applicant also referred the Court to the submissions and evidence he provided to the Minister on August 8, 2003. At that time, the applicant stated that he was not a member of the A.K. Kannan group and that the public allegations of his membership put him at risk in the event that he was returned to Sri Lanka. At paragraphs 16 and 17 of his opinion, the Minister addresses the evidence establishing the applicant's membership and involvement in the A.K. Kannan gang. This evidence includes a recorded and transcribed conversation between police officers and an informant identifying the applicant as a member of the gang, the Board's previous decision concluding that the applicant was a member, and the Federal Court judgement which upheld the Board's decision on judicial review. The Minister's Opinion thoroughly sets out his reasons for preferring certain portions of evidence to others where conflicts existed. It was open to the Minister to accept, reject and weigh the evidence before him. Upon reviewing the evidence before the Minister, I cannot conclude that his treatment of the evidence was patently unreasonable.

e. Did the Minister ignore relevant portions of the evidence submitted by the applicant on November 11, 2003 and August 3, 2004?

[35] The applicant argues that the Minister ignored "the majority of the human rights evidence put before him by counsel on November 11, 2003 and August 3, 2004". The respondents submit that decision-makers are presumed to have weighed and considered all of the evidence before them unless the contrary is shown and that the applicant has provided no evidence to rebut this presumption.

[36] The evidence submitted by the applicant is encyclopaedic in its scope. In the one-page cover letter dated November 11, 2003, the applicant's counsel summarized the 30 attached pages of attached information as follows:

> As you can see from the attached documentary evidence, the situation in Sri Lanka is very grave. The president of Sri Lanka has suspended the Parliament and taken control of key areas of the government: the Ministry of Defence, the Ministry of Interior and the Ministry of Mass Communications. The President, Ms. Chandrika Kumaratunga, has also declared a state of

> emergency. This has put on hold and seriously jeopardized the peace process in Sri Lanka. The present situation, together with the evidence before you of ongoing harassment, persecution, mistreatment and torture of Tamils shows that Mr. Nagalingam is at risk of persecution, torture, cruel and inhumane treatment and punishment, and risk to his life if he is returned to Sri Lanka.

[37] The attachments consisted of internet news articles obtained from Tamilnet.com and range in date from November 2, 2003 to November 6, 2003. The attachments to the applicant's counsel's letter dated August 3, 2004 include 307 pages of reports and news articles ranging in date from February 2001 to August 2004.

[38] The Minister states at paragraph 38 of his Opinion:

> I have carefully reviewed the entirety of the material in this case and I find that there is insufficient evidence to support a finding that it is more likely than not that Mr. Nagalingam faces a substantial risk of torture, or a risk to life or to cruel and unusual treatment or punishment.

[39] The determination of an individual's risk on return to a particular country is largely a fact-driven inquiry. It requires consideration of the human rights record of the country and the personal risk faced by an applicant. These issues are generally outside the realm of expertise of reviewing courts. I am not persuaded by the applicant's suggestion that the Minister ignored or improperly considered the evidence before him. Failing such an error, it is not the role of this Court to interfere with the factual conclusions reached by the Minister, nor is it appropriate for the Court to re-weigh the evidence before the Minister. The issues raised by the applicant do not demonstrate that the Minister's conclusion, namely that the applicant would not face a substantial risk of torture or a risk to life or to cruel and unusual treatment or punishment, was patently unreasonable.

<u>Issue No. 2</u>: If, in the preparation of an opinion under paragraph 115(2)(b), the Minister finds that a refugee who is inadmissible on grounds of organized criminality does not face a risk of persecution, torture, cruel and unusual punishment or treatment upon return to his country of origin, does such a finding render unnecessary the Minister's consideration of the "nature and severity of acts committed" under paragraph 115(2)(b)?

[40] Having determined that the Minister's finding—namely that the applicant does not face a risk of harm upon removal to Sri Lanka--was not patently unreasonable, the Court must consider whether the non-existence of risk makes unnecessary an analysis

of the nature and severity of acts committed by the applicant under subsection 115(2) of the Act.

[41] In *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 355, Justice Blanchard set out the analysis required when issuing a danger opinion under paragraph 115(2)(b) at paragraph 36:

> ¶36 Subsection 115(2) of the IRPA requires that the Applicant initially establish that there are substantial grounds upon which to believe that, if removed to Syria, he would be at risk of persecution on a Convention ground or at risk of torture, death, or cruel or unusual treatment or punishment. <u>If the risk is not established, there is no need to pursue the analysis since the applicant is not entitled to the protection afforded by subsection 115(1) of the IRPA.</u> This risk must be assessed on grounds that go beyond "mere theory" or "suspicion" but something less than "highly probable". This risk of torture must be "personal and present". The threshold to be met has been recast by asking whether refoulement will expose a person to a "serious" risk of torture. See Suresh (Court of Appeal), at paragraphs 150-152.
>
> [Emphasis added]

[42] *Almrei* dealt with a risk of torture and an applicant inadmissible on security grounds. Nevertheless, the same two-step analysis should also apply in the case of a person who is inadmissible on grounds of organized criminality.

[43] Since the Minister reasonably concluded that there was no risk of harm, the non-refoulement provisions under subsection 115(1) do not apply. There was accordingly no need to “balance” competing interests under subsection 115(2).

[44] In *Ragupathy v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151, the Federal Court of Appeal considered whether the Minister was required to consider the danger posed by an individual inadmissible on grounds of serious criminality <u>before</u> assessing the risk of harm upon his return. At paragraphs 31 and 32, Evans J.A., writing for the Court, stated:

> For the reasons given above, I agree that, since a finding that a protected person is a danger to the public by virtue of his criminality is a prerequisite of removal, this is a logical starting point in a delegate’s analysis. For, without a positive opinion on this issue, the delegate’s inquiry must end, because the person cannot be deported. Proceeding in this manner also avoids the possibility that the delegate will assess whether a

> protected person is a "danger to the public" by having regard to the risk of persecution.
>
> However, neither the text of the IRPA, nor the jurisprudence dictates as a matter of law in what order the Minister's delegate's reasons must deal with the various elements of a "danger opinion". To my mind, this is more a matter of elegance than substance and does not rise to the level of a legal requirement, especially given the degree of discretion entrusted to delegates in the formulation of their opinion. In my respectful opinion, the preferred ordering is not required either for a protected person to understand the bases of a delegate's opinion, or for a court to determine whether the delegate had committed reviewable error in performing the legal tasks entrusted to her.

[45] The Court of Appeal stated that the consideration of the danger posed by an individual was a logical starting point because it is, in effect, the *sine qua non* of deportation. The flip side of this coin, however, is that a risk of harm upon deportation is the *sine qua non* of the prohibition against refoulement. In *Ragupathy*, above, the Minister found that there was a high level of danger to the public and a small chance that the applicant would be persecuted or tortured if he was returned to Sri Lanka.

[46] In this case, the Minister first assessed the nature and severity of acts committed. He then assessed the risk of harm upon removal as non-existent. If he had reversed the order, as would be permitted under *Ragupathy*, the assessment of the nature and severity of acts committed would have been unnecessary since subsection 115(1) would not apply.

[47] On judicial review, therefore, only if the Minister's conclusion that the applicant did not face a risk of harm is found to be patently unreasonable should it be necessary to review the Minister's assessment of the nature and severity of acts committed and the balancing of that assessment against the risk of harm upon removal.

Is the Court's interpretation of section 115 consistent with the *Refugee Convention*?

[48] In concluding that the prohibition against refoulement does not apply where the Minister has determined an inadmissible refugee does not face a risk of harm upon removal, the Court is also guided by the text of the *Convention Relating to the Status of Refugees,* July 28, 1951, [1969] Can. T.S. No. 6 (the Convention), which is the international law source for the prohibition against refoulement. Paragraph 3(3)(f) of the Act directs that the Act "is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory." In interpreting paragraph 3(3)(f), the Federal Court of Appeal stated in *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, at paragraph 87:

> ¶87 Paragraph 3(3)(f) should be interpreted in light of the modern developments in courts' use of international

> human rights law as interpretative aids. Thus, like other statutes, IRPA must be interpreted and applied in a manner that complies with "international human rights instruments to which Canada is signatory" that are binding because they do not require ratification or Canada has signed and ratified them. […] Thus, a legally binding international human rights instrument to which Canada is signatory is determinative of how IRPA must be interpreted and applied, in the absence of a contrary legislative intention.
>
> [Emphasis added]

[49] Canada acceded to the Convention on June 4, 1969. The Convention is therefore legally binding on Canada under international law. Article 33(1) of the Convention provides that:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> [Emphasis added]

[50] The applicant is a refugee. If he were no longer a refugee, the Respondent could remove him from Canada based on his inadmissibility on grounds of organized criminality. However, the applicant's refugee status alone does not prevent his removal. The Convention qualifies the prohibition against refoulement as applying only to refugees whose life or freedom would be threatened on identified grounds. The Minister has chosen to remove the applicant under section 115 of the Act. This gave the applicant an opportunity to know the case against him and an opportunity to respond before he was deported. Because there is no threat to the applicant's life or freedom on the grounds identified upon return to Sri Lanka, returning the applicant does not, in my view, violate Article 33(1) of the Convention.

[51] Since the Minister's assessment that the applicant did not face a risk of harm upon removal was not patently unreasonable, the remaining issues are not determinative.

Issue No. 3: Did the Minister err in interpreting paragraph 115(2)(b) by considering the "nature and severity of the acts committed" by the criminal organization, as opposed to the applicant personally?

[52] In light of my conclusion above, it is not necessary to consider this second issue. I offer the following analysis, however, in the event I am wrong regarding the first issue or in concluding that the finding of no risk upon return to Sri Lanka is determinative. The Minister's Opinion, after reviewing the evidence, is set out at paragraph 29 of the Opinion:

> Following from the evidence noted above, including Mr. Nagalingam's membership and involvement in the A.K. Kannan, in my view, the nature and severity of the acts committed by the A.K. Kannan are serious and significant, and as such Mr. Nagalingam should not be allowed to remain in Canada.

[53] The Minister's Opinion, after reviewing the evidence, is set out at paragraph 29 of the Opinion:

> Following from the evidence noted above, including Mr. Nagalingam's membership and involvement in the A.K. Kannan, in my view, the nature and severity of the acts committed by the A.K. Kannan are serious and significant, and as such Mr. Nagalingam should not be allowed to remain in Canada.
>
> [Emphasis added]

[54] The Minister referred to the acts committed by the applicant at paragraph 27:

> I note that Mr. Nagalingam has relatively few criminal convictions as follows: [mischief under $5,000; failure to comply with recognizance; assault].

[55] The issue is whether paragraph 115(2)(b) means "the nature and severity of the acts committed" by the criminal organization or by the applicant personally.

[56] For ease of reference I repeat paragraph 115(2)(b) of the Act:

115.	**115.**
…	…
Exceptions	Exclusion
(2) Subsection (1) does not apply in the case of a person …	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire : …
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should	b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou

not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

Rules of Statutory Intepretation

[57] The Supreme Court of Canada summarized the principles and two part procedure of interpreting bilingual statutes in *Medovarski v. Canada (Minister of Citizenship and Immigration)*; *Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539. At paragraphs 24 to 26, Chief Justice McLachlin wrote:

> 24 In interpreting bilingual statutes, the statutory interpretation should begin with a search for the shared meaning between the two versions: P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 327. In [*R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6], Bastarache J. held for the Court that the interpretation of bilingual statutes is subject to a two-part procedure.
>
> 25 First, one must apply the rules of statutory interpretation to determine whether or not there is an apparent discordance, and if so, whether there is a common meaning between the French and English versions. "[W]here one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning": [*Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269, 2002 SCC 62], at para. 56, *per* LeBel J. *Schreiber* concerned a discrepancy between the French version of s. 6(*a*) of the *State Immunity Act*, R.S.C. 1985, c. S-18, which stated that the exception to state immunity is narrowly "*décès*" or "*dommages corporels*", compared to the broader English "death" or "personal injury". Given the conflict between the two provisions the Court adopted the clearer and more restrictive French version. The common meaning is the version that is plain and not ambiguous. If neither version is ambiguous, or if they both are, the common meaning is normally the narrower version: *Daoust*, at paras. 28-29.
>
> 26 Second, one must determine if the common meaning is consistent with Parliament's intent: *Daoust*, at para. 30.

[Emphasis added]

[58] In applying the rules of statutory interpretation to determine whether or not there is an apparent discordance between the French and English versions of the paragraph, it is clear that there is an ambiguity in the English version because the English version does not link the "acts committed" either to the individual or to the criminal organization. That is left vague. The French version is clear. The French text reads: *"… il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.*" [Emphasis added] The literal translation of the French version is "because of the nature and severity of his past acts".

[59] The Court is satisfied that the common meaning is the French version. It is plain, not ambiguous and narrower. Therefore, according to the rules of statutory interpretation with respect to bilingual statutes, paragraph 115(2)(b) means that the Minister must decide whether the applicant should be allowed to remain in Canada on the basis of the nature and severity of his personal acts.

[60] The second step in the interpretation of paragraph 115(2)(b), as stated by the Supreme Court of Canada in *Medovarski,* above*,* is that the Court must determine if the common meaning is consistent with Parliament's intent. This principle of statutory construction was described by Elmer Driedger in *The Construction of Statutes* (Toronto: Butterworths, 1974) was adopted by the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 41:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[61] Considering the words of the paragraph with the scheme of the Act, the object of the Act and the intent of Parliament, the Court concludes Parliament intended that the Minister consider the nature and severity of the acts committed by the person, as opposed to the criminal organization as a whole. The logical reason to examine the nature and gravity of the personal acts committed by the refugee is that the refugee should not be refouled only because he is a member of a criminal organization unless the acts in which he was involved warrant removal. As will be discussed below, the Minister can look at the acts committed by the criminal organization if it is established that the refugee was complicit in those acts, i.e. there are reasonable grounds for believing that the refugee was personally and knowingly involved in these crimes.

Complicity

[62] In the leading case of *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 at 317-318, the Federal Court of Appeal considered

what extent of participation was required for inclusion as an accomplice such that a person could be found to have "committed" a crime against peace, a war crime, or a crime against humanity. The Court stated:

> What degree of complicity, then, is required to be an accomplice or abettor? A first conclusion I come to is that mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status. […]
>
> [S]omeone who is an associate of the principal offenders can never, in my view, be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts.
>
> At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law (e.g., s. 21(2) of the Criminal Code), and I believe is the best interpretation of international law.
>
> [Emphasis added]

[63] Therefore the test for complicity is whether the applicant was a personal and knowing participant in the criminal activities of the organization. There must be reasonable grounds to believe that the applicant "was complicit"; in *Ramirez,* above, this means that the applicant had "personal knowledge and knowing participation".

[64] This test for complicity under the Act has been settled by the Court with respect to crimes against humanity. Such crimes are also part of paragraph 115(2)(b), and this standard is a reasonable one for the purposes of establishing complicity under paragraph 115(2)(b). See my decision in *Catal v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1875 at paragraphs 8 and 9.

[65] Therefore, the proper interpretation of paragraph 115(2)(b) is one that requires the Minister consider the nature and severity of the acts committed personally by the applicant, and by the A.K. Kannan gang if the applicant was a personal and knowing participant in such acts, i.e. complicit.

The applicant's personal and knowing involvement, i.e. complicity

[66] The Minister's Opinion is 20 single-spaced pages. In reading the opinion as a whole, I have identified the paragraphs where the Minister discusses the applicant's personal and knowing participation in the criminal acts of the gang. These references are contained in the following paragraphs:

> ¶16. In terms of the nature and severity of the acts committed, the evidence shows the existence of facts supporting Mr. Nagalingam's … involvement in the criminal activities of the A.K. Kannan … . According to P.A. (an informant to the Toronto Police), the A.K. Kannan was known to be a gang and the Applicant was known to be an "enforcer" within that group.
>
> ¶17. I am of the view that the evidence shows the existence of facts supporting Mr. Nagalingam's … involvement in the criminal activities of the A.K. Kannan.
>
> ¶29. Following from the evidence noted above, including Mr. Nagalingam's … involvement in the A.K. Kannan, in my view, the nature and severity of the acts committed by the A.K. Kannan are serious and significant, and as such Mr. Nagalingam should not be allowed to remain in Canada.
>
> [Emphasis added]

[67] The standard of proof for determining "the acts committed" by the applicant for the purpose of paragraph 115(2)(b) is that the Minister have reasonable grounds for believing that the applicant committed the acts. The applicant was found by the Minister to be personally involved in the criminal activities of the gang (paragraph 16); was known to be an "enforcer" within that gang (paragraph 16); and was personally involved in the criminal activities of the gang (paragraph 17). Based on the evidence about the gang, including the applicant's involvement with the gang, the Minister's Opinion was that the nature and severity of the acts committed by the gang are serious and significant.

[68] The Court is satisfied that the Minister's Opinion found that the applicant was personally and knowingly participating in some criminal activities of the gang. This means in law that the applicant was complicit in those criminal acts. However, the Minister's Opinion at paragraph 29 did not make an express finding that the applicant was complicit in the serious and significant criminal acts of the gang. The Minister might have made that conclusion if the Minister had interpreted that the "acts committed" under paragraph 115(2)(b) were the "personal" acts of the applicant, including the acts of the gang in which the applicant was complicit. In this respect, the Minister erred in law in his interpretation of paragraph 115(2)(b) of the Act. The Minister based his opinion on the acts committed by the criminal organization. Accordingly, if it were not the case that the Minister's factual finding that the applicant did not face a risk of harm upon removal is determinative of this application, the Court would allow this application, and refer the matter back to another delegate of the Minister to determine if the applicant was complicit in the serious and significant criminal acts of the gang for the purposes of paragraph 115(2)(b) of the Act.

Issue No. 4: Did the Minister err in failing to consider the applicant's risk of persecution?

[69] The applicant argues that, while the Minister considered the applicant's risk of torture, and the risk to his life, cruel and unusual treatment or punishment, the Minister erred in failing to consider also the applicant's risk of persecution upon return to Sri Lanka.

[70] The applicant submits that, in applying the Supreme Court of Canada's judgment in *Suresh*, above, the Minister failed to recognize that the risk review required under section 115 of the Act is broader than what the Court required under section 53 of the former Act in *Suresh*.

[71] I conclude that section 53 of the former Act is not materially different than section 115 of the Act. Section 53 of the former Act provides:

Prohibited removal

53. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

(a) the person is a member of an inadmissible class described in paragraph 19(1)(c) or subparagraph 19(1) (c. 1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada;

(b) the person is a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger; or

(c) the person is a person described in subparagraph 27(1) (a. 1)(i) and the Minister is of the opinion that the person

Renvoi de réfugiés au sens de la Convention

53. (1) Par dérogation aux paragraphes 52(2) et (3), la personne à qui le statut de réfugié au sens de la Convention a été reconnu aux termes de la présente loi ou des règlements, ou dont la revendication a été jugée irrecevable en application de l'alinéa 46.01(1)a), ne peut être renvoyée dans un pays où sa vie ou sa liberté seraient menacées du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, sauf si, selon le cas:

a) elle appartient à l'une des catégories non admissibles visées à l'alinéa 19(1)c) ou au sous-alinéa 19(1) c.1)(i) et que, selon le ministre, elle constitue un danger pour le public au Canada;

b) elle appartient à l'une des catégories non admissibles visées aux alinéas 19(1)e), f), g), j), k) ou l) et que, selon le ministre, elle constitue un danger pour la sécurité du Canada;

c) elle relève du cas visé au sous-alinéa 27(1)a. 1)(i) et que, selon le ministre, elle constitue un danger pour le public au Canada;

d) elle relève, pour toute infraction

constitutes a danger to the public in Canada; or (d) the person is a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed and the Minister is of the opinion that the person constitutes a danger to the public in Canada.	punissable aux termes d'une loi fédérale d'un emprisonnement maximal égal ou supérieur à dix ans, du cas visé à l'alinéa 27(1)d) et que, selon le ministre, elle constitue un danger pour le public au Canada.

[72] As the excerpt above indicates, the key difference between the provisions under the current and former Acts is that the former Act refers to a risk that "<u>the person's life or freedom would be threatened</u> for reasons of race, religion, nationality, membership in a particular social group or political opinion" while the current Act refers to persons "<u>at risk of persecution</u> for reasons of race, religion, nationality, membership in a particular social group or political opinion <u>or at risk of torture or cruel and unusual treatment or punishment.</u>"

[73] In my view, there is no material difference between the versions. A threat to an individual's "life or freedom" on Convention grounds undoubtedly constitutes persecution. Conversely, a risk of persecution on Convention grounds is a threat to an individual's freedom if not his life.

[74] It is clear from the Minister's opinion that he did not find that there was "more than a mere possibility" that the applicant would face a risk of torture or cruel and unusual treatment or punishment. Throughout the opinion, the Minister also refers to the applicant's risk of persecution upon return to Sri Lanka. For example, at paragraph 37, the Minister considers the applicant's claim that he faces a risk of persecution based on his status as a young Tamil male. Considering the opinion in its entirety, I am satisfied that the Minister included within his assessment the applicant's risk of persecution on Convention grounds.

<u>Issue No. 5</u>: Does paragraph 115(2)(b) target non-citizens in a manner that is contrary to section 7 of the *Canadian Charter of Rights and Freedoms*?

[75] The applicant also challenges the validity of paragraph 115(2)(b) on the basis that it violates section 7 of the Charter, which guarantees "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[76] Given that the applicant does not face a risk of persecution, torture or other ill treatment if returned to Sri Lanka, no deprivation of the applicant's life, liberty or security of the person arises in this case.

CONCLUSION

[77] For the reasons above, the application for judicial review is dismissed. The Minister's conclusion that the applicant did not face a risk of persecution, torture, or other ill treatment upon returning to Sri Lanka was not patently unreasonable. This finding, in my view, obviated the need to further consider the nature and severity of acts committed since the only barrier to the applicant's removal was the prohibition under subsection 115(1) of the Act against returning or refouling him to a territory in which he faced a risk of harm as identified in Article 33(1) of the Convention. However, if I am incorrect in concluding that the first issue is determinative, I would have allowed the application on the basis that the Minister erred in his interpretation of paragraph 115(2)(b) of the Act.

CERTIFIED QUESTION

[78] This application raises for the first time a serious question of general importance with respect to the proper interpretation of paragraph 115(2)(b). My review of the jurisprudence indicates that this is the first case in which an issue arises as to the interpretation of paragraph 115(2)(b) with respect to persons inadmissible on grounds of organized criminality. The existing case law is limited to interpretations of this paragraph as it applies to persons inadmissible on grounds of security, or for violating human or international rights. Both parties agree that this is a question which should be certified. I agree and will certify the following questions:

1. If, in the preparation of an opinion under paragraph 115(2)(b) of the *Immigration and Refugee Protection Act* , the Minister finds that a refugee who is inadmissible on grounds of organized criminality does not face a risk of persecution, torture, cruel and unusual punishment or treatment upon return to his country of origin, does such a finding render unnecessary the Minister's consideration of the "nature and severity of acts committed" under paragraph 115(2)(b)?

2. If the lack of risk identified in question #1 is not determinative, is paragraph 115(2)(b) of the *Immigration and Refugee Protection Act* to be applied "on the basis of the nature and severity of acts committed" by the criminal organization of which the person is a member, or of acts committed by the person being considered for removal (including acts of the criminal organization in which the person was complicit)?

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. The following questions are certified:

   1. If, in the preparation of an opinion under paragraph 115(2)(b) of the *Immigration and Refugee Protection Act* , the Minister finds that a refugee who is inadmissible on grounds of organized criminality does not face a risk of persecution, torture, cruel and unusual punishment or treatment upon return to his country of origin, does such a finding render unnecessary the Minister's consideration of the "nature and severity of acts committed" under paragraph 115(2)(b)?

   2. If the lack of risk identified in question #1 is not determinative, is paragraph 115(2)(b) of the *Immigration and Refugee Protection Act* to be applied "on the basis of the nature and severity of acts committed" by the criminal organization of which the person is a member, or of acts committed by the person being considered for removal (including acts of the criminal organization in which the person was complicit)?

"Michael A. Kelen"

Judge